

## APPELLATE CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice,  
and Mr. Justice Doss.

BIPIN BEHARI MITRA

v.

JATINDRA NATH GHOSE.\*

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*Mortgage—Execution—Stay of sale in execution of mortgage-decree—Jurisdiction of Court to stay sale—Waiver on behalf of minor of fresh sale-proclamation—Guardian-ad-litem, right of—Benefit to minors—Minors, if entitled to impugn sale afterwards for want of fresh proclamation—Transfer of Property Act (IV of 1882) s. 89—Civil Procedure Code (XIV of 1882) s. 291.*

The Court has jurisdiction to order stay of a sale in execution of a mortgage-decree under s. 291 of the Civil Procedure Code, 1882.

*Shyamkishan v. Sundar Koer* (1) explained. *Bibijan Bibi v. Sachi Bewah* (2) referred to.

There is no conflict between s. 89 of the Transfer of Property Act and s. 291 of the Code of Civil Procedure, 1882. The former section is concerned with the Court's order-absolute for sale, the latter with the adjournment of the sale. The two sections relate to different matters.

Even if an order of the Court is erroneous, it is *ordinarily* not open to a party, who has obtained and enjoyed the benefit of an erroneous order, to turn round afterwards and ask that the order should be treated as a nullity and disregarded.

The guardian *ad litem* appointed by the Court and acting in good faith is entitled to make applications on behalf of the minors, and has the power to waive the right of the minors to a fresh sale-proclamation after postponement of the sale, if the postponement enured to the benefit of the minors.

The minors are not entitled in such a case to impugn the sale on the ground that a fresh sale-proclamation was not made.

APPEAL [No. 313] by Bipin Behari Mitra and others, the auction-purchasers; and Appeal [No. 449] by Khoka Lal Mitra, minor, by his certificated guardian and mother, Parulsundari Dasi, the decree-holder.

On the 20th July 1896, Surendranath Ghose and Manindranath Ghose executed a mortgage bond in favour of Lal Behari

\*Appeals from orders, Nos. 313 and 449 of 1908, against the orders of Raj Krishna Banerjee, Subordinate Judge of 24-Parganas, dated June 30, 1908

(1) (1904) 1. L. R. 31 Calc. 373. (2) (1904) 1. L. R. 31 Calc. 863,

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Mitra. On a suit based on the said bond, a mortgage-decree was passed on the 9th December 1899. In this decree all the previous and subsequent mortgagees were parties besides the mortgagors. The decree was executed on the 27th November 1900. While the execution case was pending, Surendranath preferred an appeal against the decree and got an order from the High Court for stay of the execution case, upon depositing Rs. 2,000 and furnishing security to the satisfaction of the lower Court. The sum of Rs. 2,000 was deposited, but upon failure to furnish security, the mortgaged properties were sold free from all incumbrances and purchased by one Jogendra Chandra Ghose at Rs. 1,08,560. Subsequently, the said decree was set aside by the High Court, and a fresh decree was passed in lieu of the original decree. The sale was thereafter set aside. The fresh decree passed by the High Court was then executed, and in this execution case the minor sons of the deceased judgment-debtor were made parties, and their mother was nominated by the decree-holders as the guardian *ad litem* of the minors. She expressed her unwillingness to act as their guardian. Thereupon, the nazir was appointed the guardian *ad litem* by the Court. The 14th of July 1902 was at first fixed as the date of sale. On the 11th July all the judgment-debtors, major or minor, applied for 3 months' time to enable the Collector to make necessary inquiries for taking the properties under the Court of Wards and for paying off the debts due to the decree-holders. On that application two months' time was granted to the judgment-debtors for making the necessary inquiries, on condition, among others, that they would waive their right to a fresh sale-proclamation, and making other objections regarding the irregularity in publishing the sale-proclamation. The judgment-debtors complying with the conditions, by a written application, the sale was postponed till the 15th September 1902. On that date the decree-holder's uncle, Bipin Behari Mitra, who lives jointly with the decree-holder, and who was one of the prior mortgagees, purchased all the mortgaged properties in the district of Packerganj, and his friend, Bipin Behari Bhattacharji,

purchased the judgment-debtors' house. This was the sale which was sought to be set aside in the case now on appeal. One of the grounds was that no waiver could be made on behalf of the minor judgment-debtors.

The Subordinate Judge held that the Court had no power to adjourn the sale of the mortgaged properties with a view to give time to the mortgagor to raise money to pay off the decree, and that the nazir, who had been appointed guardian *ad litem* of the minors, did not act properly, or for the benefit of the minors, in filing the petition of postponement of the sale and waiving a fresh sale-proclamation. He, therefore, held that the minors were not bound by the act of the nazir and set aside the sale.

*Dr. Rashbehary Ghosh* (with him *Babu Tarakishore Chaudhuri, Babu Prabhask Chandra Mitra, Babu Jadunath Kanjibul* and *Babu Hari Charan Ganguli*), for the appellants in Appeal No. 313. The mother is not competent to supersede the nazir as guardian: *Jwala Dei v. Pirbhu* (1), *Venkata Chandrasekhara Raz v. Alakarajamba Maharani* (2) and *Krishna Pershad Singh v. Gosta Behari Kundu* (3). There is no finding of fraud. Sale has been set aside on the ground that the Court had no jurisdiction to allow postponement. There is no authority for holding so. *Shyankishen v. Sundar Koer* (4), relied on by the learned Subordinate Judge, does not hold that the Court has no jurisdiction. There is no conflict between section 89 of the Transfer of Property Act and section 291 of the Civil Procedure Code; *Bibijan Bibi v. Sachi Bewah* (5).

On the question of the guardian's right to a waiver, the case of *Luchmeswar Singh v. Chairman of the Darbhanga Municipality* (6), relied on by the Subordinate Judge, has no bearing. *Mussanut Bibee Efatoonnissa v. Khondkar Khoda Newaz* (7) is inapplicable. The minors have enjoyed the benefit of the postponement. They are now estopped from questioning it.

(1) (1891) I. L. R. 14 All. 35.

(2) (1898) I. L. R. 22 Mad. 187.

(3) (1907) 5 C. L. J. 434.

(4) (1904) I. L. R. 31 Calc. 373.

(5) (1904) I. L. R. 31 Calc. 863.

(6) (1890) I. L. R. 18 Calc. 99.

(7) (1874) 21 W. R. 374.

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As regards the plea of irregularity, it must be established that inadequacy of price at the sale was the result of the irregularity : *Mahabir Pershad Singh v. Dhanukdhari Singh* (1), *Ismail Khan v. Abdul Aziz Khan* (2), *Roy Gowree Nath Sahoy v. Shah Fukeer Chand* (3), *Baijnath Goenka v. Maharaja Sir Ravanewar Prasad Singh* (4) and *Gajrajmati Teorain v. Akbar Husain* (5). The minor is bound by the consent of the guardian. The principle of the case of *Sheo Nath Saran v. Sukh Lal Singh* (6) is applicable.

*Mr. B. Chakravarti* (with him *Babu Surendranath Sen* and *Babu Bimal Chandra Sen Gupta*), for the appellant in Appeal No. 449.

*Mr. A. Chaudhuri* (with him *Babu Jogesh Chandra Roy*, *Babu Manmathanath Mukherji*, *Babu Amarendranath Bose* and *Babu Hiralal Chakrabarti*), for the respondents. Guardian's consent to certain matters of procedure may be binding, but not in matters involving such important issues. In such cases absence of bidders may be presumed : *Goopee Nath Dobey v. Roy Luchmeeput Singh Bahadur* (7). *Shyamkishan v. Sundar Koer* (8) is in my favour. See also *Bibijan Bibi v. Sachi Bewah* (9). If the order was not without jurisdiction, it was at least irregular, and then I have only to show that I have suffered loss.

As regards the waiver, it was not good without the sanction of the Court. A fresh proclamation must be made under the Code. The right to a fresh proclamation is not a right inherent in a person. On the question of waiver, see *Dhanukdhari Singh v. Nathima Sahu* (10). It is a question of fact, and we have to see whether there was actually a waiver. Did the guardian understand what he was doing ?

*Mr. B. Chakravarti*, in reply.

*Cur. adv. vult.*

(1) (1904) I. L. R. 31 Calc. 815.

(2) (1905) I. L. R. 32 Calc. 502.

(3) (1872) 18 W. R. 347.

(4) (1907) 6 C. L. J. 163.

(5) (1906) I. L. R. 29 All. 196 ;

L. R. 34 I. A. 37.

(6) (1899) I. L. R. 27 Calc. 229.

(7) (1877) I. L. R. 3 Calc. 542.

(8) (1904) I. L. R. 31 Calc. 373.

(9) (1904) I. L. R. 31 Calc. 863

(10) (1907) 11 C. W. N. 848.

JENKINS C.J. This is an appeal [No. 313] from an order made by the Subordinate Judge of the 24-Parganas on the 30th of June 1908, setting aside a sale in execution held as far back as September 1902.

The mortgage, on which the suit and the execution proceedings were founded, bears date the 9th of December 1899, and thereby Surendra Nath Ghose and Manindra Nath Ghose mortgaged the property in dispute to Lalbehari Mittra to secure Rs. 25,000.

On the 25th of September 1899, the mortgagee instituted a suit against the mortgagors and certain prior and puisne mortgagees for the realisation of his mortgage, and on the 1st of August 1901 a decree was passed on appeal by the High Court directing, in the events that have happened, a sale of the properties subject to all prior incumbrances, unless the incumbrancers consented to the sale. On the 18th of January 1902 an order absolute for sale was made.

On the 2nd February 1902, Manindra Nath Ghose died and was succeeded by his minor sons and heirs, on whose application the order now under appeal was made.

Their mother having expressed her unwillingness to be so appointed, the nazir of the Court was, on the 26th of April 1902; in accordance with the usual practice, appointed to be guardian for the suit for the minors.

The day fixed for the sale of the property was the 14th of July, but on the 10th of July the judgment-debtors, the minors, being represented by their guardian, applied at the Collector's suggestion for a postponement of the sale for three months, with a view to enquiries being made whether the properties should be taken under the charge of the Court of Wards. Notwithstanding the decree-holder's objection, two months' time was granted, but it was made a condition of this concession that the judgment-debtors should pay Rs. 200 as damages to the decree-holder and "waive their right to a fresh sale-proclamation and to making other objections regarding the irregularity in publishing the sale-proclamation."

On the 14th July 1902 a petition was presented by Surendra Nath Ghose and the nazir on behalf of the minors, stating that

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they had brought the Rs. 200 into Court, and waived all right to the issue of a fresh sale proclamation and all objections on the ground of irregularities in connection with the execution of the decree, and they prayed that the decree-holder might be directed to receive the Rs. 200 and that the sale might be postponed, and Monday the 15th of September fixed for the sale.

On the same day the Court made an order as prayed, and postponed the sale till 1 P.M. of the 15th September 1902 without any fresh sale-proclamation. The Court of Wards did not take the property under its charge, and in the end the sale was held on the 15th of September 1902 as directed, without any fresh sale-proclamation. At the sale, the present appellant purchased the property for Rs. 39,878 subject to prior incumbrances, which are estimated at over Rs. 85,000. On the 13th November 1902 the sale was confirmed and possession was delivered on the 19th of December 1902.

On the 29th of August 1903 the minors' mother applied, under the Guardian and Wards Act, to be appointed their guardian, and on the following 8th of December a certificate was granted to her. On the 12th of June 1907 she made the present application to set aside the sale, and this she did, though the nazir had not been removed. The petition embodying the application charges fraud, illegality and irregularity on the part of the decree-holder, and neglect of duty on the part of the nazir; but the Subordinate Judge has not upheld these charges, nor have they been advanced before us. The learned Judge, however, held that the nazir "did not act properly and for the benefit of the minors in filing the petition on the 14th July making the waiver under consideration and . . . . . that they are not bound thereby." In coming to this conclusion, he was influenced by his view that "the postponement of the sale from the 14th July to the 15th September, and no proclamation having been made that the sale would take place on the latter date, caused substantial loss to the judgment-debtors."

He accordingly set aside the sale absolutely and unconditionally, regardless of the fact that Surendra Nath Ghose was

not a party, and without any direction as to the purchase-money paid by the purchaser, or the amount expended by him in the discharge of prior incumbrances and for other matters. By the rules of this Court, section 291 of the Code of Civil Procedure, 1882, applied to this sale, and that section empowered the Court in its discretion to adjourn any sale to a specified day and hour; but it was prescribed that whenever a sale was adjourned under the section for a longer period than 7 days a fresh proclamation should be made, unless the judgment-debtor consented to waive it. Now, on the facts I have narrated, there can be no question that Surendra Nath Ghose gave such consent, and that the nazir, as the guardian for the suit for the minors, purported to give his consent. The only question is whether, in so doing, the nazir acted beyond his powers. That he acted in good faith is beyond dispute. The minors' own mother on the 22nd April 1902 presented a petition to the Court whereby she prayed that a proper order might be passed for staying the execution proceedings till the final disposal of the application made on behalf of the minors to the Board of Revenue. Surendra Nath, the minors' adult uncle, joined with the nazir in making the application for postponement, and submitted to the condition imposed by the Court: the petition itself shows that the application was made at the Collector's suggestion: and the condition was imposed by the Court before whom all the material facts were placed. But, then, it is urged on behalf of the minors that even though the nazir acted in good faith, he had not the power to waive a fresh proclamation: *first*, because the whole order was beyond the Court's jurisdiction; and, *secondly*, because the nazir, as guardian, had not the power to give up a right vested in the minors.

The argument that the order was without jurisdiction rests on certain remarks contained in the judgment of the Court in *Shyamkishan v. Sundar Koer* (1) which, it is contended, show that in the circumstances it was not competent to the Court to adjourn the sale, inasmuch as it was in execution of a mortgage-decree. The contention rests on a supposed conflict between

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section 89 of the Transfer of Property Act and section 291 of the Code of Civil Procedure, 1882. But I fail to see the conflict: the one section is concerned with the Court's order absolute for sale, the other with the adjournment of the sale directed, and so they relate to different matters. Reading the judgment in *Shyamkishan's case* (1) as a whole, I do not think it was intended to lay down that the order for adjournment was without jurisdiction, but only that it was erroneous [cf. *Bibijan Bibi v. Sachi Bewah* (2)]. But even assuming, for the sake of argument, that the order with which we are concerned was erroneous, it obviously is not ordinarily open to a party, who has obtained and enjoyed the benefit of an erroneous order, afterwards to turn round and ask that the order should be treated as a nullity and disregarded. But does it make any difference that minors were concerned? The guardian was clearly entitled to make the application on behalf of the minors (section 441 of the Civil Procedure Code, 1882), and in my opinion he could consent to waive, as he did, the fresh proclamation, that being a condition on which the Court insisted as a term of making the concession sought. It is argued that in so doing he gave up a right belonging to the minors, and that this he could not do. But the right was one created by section 291 of the Civil Procedure Code, and was a mere matter of procedure in execution prescribed by that section. I therefore fail to see what there was to prevent the guardian, acting as he did in good faith, from giving the consent contemplated by the section so as to bind the minors thereby. Therefore, I hold that the minors cannot now impugn the sale on the ground that a fresh proclamation was not made.

In this view of the case, it is not strictly necessary to consider how far the Subordinate Judge's conclusion as to the loss occasioned to the judgment-debtors by the waiver of the fresh proclamation can be sustained; but as the matter has been discussed before us, and the evidence has been brought to our notice, I think it right to say that I am unable to agree with the Subordinate Judge. In effect, he bases his conclusion on the

(1) (1904) I. L. R. 31 Calc. 373.

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supposition that the net income of the property was not less than Rs. 12,000, and that 17 $\frac{3}{4}$  years' purchase was a fair estimate of its capital value.

In taking Rs. 12,000 as the net income, the learned Judge was influenced by the judgment-debtor's treaty with the appellant for a *putni* at that rate ; but nothing came of it. Mr. Chaudhuri has further attempted to support this figure by a statement in Romesh Chandra Chakravarti's affidavit filed on the 11th July 1902, in which he says : " I made an enquiry in the locality, and at the cutchery of the judgment-debtors, and came to know and believe that the annual net income thereof would be Rs. 12,000 (twelve thousand), and that the value thereof in an unencumbered estate would by no means be more than Rs. 1,10,000."

This, it is said, shows that the Judge was justified in taking the net profits as Rs. 12,000 ; but the affidavit itself indicates the information on which this estimate was based, and in this oral evidence before the Subordinate Judge, Romesh Chandra Chakravarti explains the statement in his affidavit in a manner which deprives it of the force that the respondents would ascribe to it.

After careful consideration of the oral evidence, and of the tables of figures that have been placed before the Court, I am not convinced that the net income of the property was at the time of the sale Rs. 12,000. Mr. Chaudhuri endeavoured to support the view that the income of the properties could not be less than this sum by a reference to certain settlement papers. No reliance, however, was placed on these in the Court of first instance, and rightly so, for the inference sought to be drawn from them rests on the fallacy of identifying the annual value of a piece of land with the sum of the rents payable in respect of the several tenures and under-tenures relating to it. The acceptance of 17 $\frac{3}{4}$  years' purchase as the proper multiplier, for the purpose, of arriving at the capital value of the land rests on the evidence of Raj Kumar Singha, a servant of Maharaj Kumar Kristo Das Laha, who speaks to a treaty for the purchase by his master of the property at 17 $\frac{3}{4}$  years' purchase.

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But this treaty proved infructuous, and it would be a mistake to place too much reliance on it. It is true that some of the judgment-debtors' witnesses, speaking generally, would put the multiplier at 12, 15, 16, 20, or 25 years' purchase. But as against this there is distinct evidence on the appellant's side of two specific sales, in one of which the property was sold at 6, and in the other at 9 years' purchase, and it is contended on behalf of the appellants that this represents fair value.

The figure may appear small, but regard must be paid to all the circumstances. First, it must be borne in mind that this was a forced sale, and the difficulties that attended an auction-purchaser have become proverbial.

This case has proved no exception, for there is evidence that this litigation is financed by the tenants; whether this is purely for altruistic motives may perhaps be doubted. Then the character borne by the district in which this property lies does not encourage high prices; it is subject to inroads of the sea, and it was treated as matter of common notoriety before us by counsel on both sides that the tenants of Backerganj have not the reputation of being the most tractable. Nor can I disregard the fact that though more than a year elapsed between the decree and the sale, no one could in the interval be discovered to save the judgment-debtors' position by finding the required money either as purchaser or mortgagee, and yet there is reason to suppose that efforts were made in this direction on behalf of the mortgagors.

I am, in these circumstances, unable to adopt the Subordinate Judge's view that the absence of fresh proclamation occasioned a substantial loss to the judgment-debtors, for it is not shown that the Judge's estimate of the value of the property represents what it would be reasonable to expect as the result of a forced sale, nor has it been shown that the absence of the fresh proclamation in any way affected the sale, which, it is to be noted, was adjourned on the 14th of July to a specified day and hour. Several other points were urged on behalf of the appellants, but in the view I take, they need not be noticed, and though cross-objections were filed on behalf of the

judgment-debtors, their counsel, in the exercise of his discretion, stated that he could not properly urge before us anything beyond those topics with which I have dealt, and it is on these alone that he has relied.

The result is that the appeal must be allowed, the order of the Court below reversed, and the application to set aside the sale dismissed with costs throughout.

This judgment will govern the other appeal (No. 449), in which the application is accordingly dismissed with costs throughout.

Doss J. concurred.

S. M.

*Appeals allowed.*

## ORIGINAL CIVIL.

*Before Mr. Justice Pugh.*

SARAT CHANDRA ROY CHOWDHRY

*v.*

M. M. NAHAPIET.\*

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*Mortgage—Practice—First mortgagee's suit for sale—Surplus of sale proceeds—Second mortgagee's claim for sale in first mortgagee's suit of other property on which he has a mortgage—Civil Procedure Code (Act V of 1908) order XXXIV—Costs.*

*B* mortgaged property in Calcutta to *A* and afterwards mortgaged the same property and a further property in the mofussil to *C*. *A* brought an ordinary mortgage suit against *B* for sale, making *C* a party-defendant. *A* obtained a decree. *C* thereupon claimed to be entitled to a decree for sale of the property mortgaged to *A* including the mofussil property not included in *A*'s mortgage:—

*Held*, that in *A*'s suit *C* could only obtain the surplus of the sale proceeds of the property in that suit and could not get any relief against the other property in the mofussil.

*Kissory Mohun Roy v. Kally Churn' Ghose* (1), *Kissory Mohun Roy v. Kali Churn Ghose* (2), *In re Kissory Mohan Roy v. Kali Charan Ghose* (3), and *Platt v. Mendel* (4) distinguished.

\* Original Civil Suit No. 1151 of 1909.

(1) (1894) I. L. R. 22 Calc. 100.

(3) (1896) I C. W. N. 106.

(2) (1897) I. L. R. 24 Calc. 190.

(4) (1884) 27 Ch. D. 246.

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